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The Montreal Convention: Analysis of Some Aspects of the Attempted Modernization and Consolidation of the Warsaw System

Pablo Mendes De Leon

Werner Eyskens

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THE MONTREAL CONVENTION: ANALYSIS OF SOME ASPECTS OF THE ATTEMPTED MODERNIZATION AND CONSOLIDATION OF THE WARSAW SYSTEM

PABLO MENDES DE LEON*

WERNER EYSKENS**

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* Director, International Institute of Air and Space Law – Leiden University.

** Member of the Brussels Bar.

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I. INTRODUCTION

A. THE STATED NEEDS FOR A NEW CONVENTION: MODERNIZATION AND CONSOLIDATION

THE MONTREAL CONVENTION of May 28, 1999 ("MC") for the unification of certain rules for international carriage by air has been drafted with the purpose of modernizing and consolidating the Warsaw Convention and related instruments. Further, there was a need to better protect the interests of passengers and shippers of cargo. It was widely felt that the balance between the interests of the air carrier on the one hand, and the passengers on the other, had to be restored to benefit the consumer.

The Warsaw Convention ("WC") itself and the treaties of the "Warsaw System" were "candidates" for consolidation into a new convention. The following treaties are all amendments of, or supplements to, the Warsaw Convention of 1929:

- the Hague Protocol of 1955 ("HP"),
- the Guadalajara Supplementary Convention of 1961,
- the Guatemala City Protocol of 1971 ("GCP"),
- Montreal Protocols 1, 2 and 3 of 1975, and
- Montreal Protocol 4 of 1975 ("MP4"), modernizing the cargo provisions of the Warsaw Convention.

These treaties did not meet the requirements of a modern air transport system in which airlines were offering and operating their services more independently from governments. A number of unilateral initiatives, and national and private law mea-

asures were designed to take greater care of the passengers' interests.¹

B. ALTERNATIVES FOR A NEW CONVENTION

These unilateral initiatives demonstrate that it was time for the ICAO to take the lead again. Consolidating these legal measures, several alternatives for a new convention were presented during the 1990s, including:

- 1) the retention of the *status quo*, that is, the Warsaw regime supplemented by regional and private arrangements, together forming a "patchwork" of treaties and other arrangements;

¹ In 1966, the Montreal Agreement, which was *de facto* a unilateral policy initiative taken by the US Civil Aeronautics Board (CAB), was concluded;

In 1976, a number of European countries, grouped together in the so-called "Malta Group" made the grant of a license to an air carrier dependant on the inclusion of a provision in the Conditions of carriage that its liability limits be raised to 80,000 or 100,000 Special Drawing Rights ("SDR");

In 1985, the Constitutional Court in Italy decided that the provisions of Italian law giving effect to the limitation of liability as foreseen in Article 22(1) WC/HP were anti-constitutional. The Italian Law 274 of July 7, 1988 imposed a new limit of SDR 100,000;

In 1992, the Japanese carriers amended their Conditions of carriage to the effect that the liability limits for passenger injury or death in international carriage governed by the Warsaw Convention or the Hague Protocol are not applied, whereas for claims up to SDR 100,000, a regime of strict liability was introduced;

In 1994, the Sixteenth Plenary Session of the European Civil Aviation Conference (ECAC) adopted Recommendation 16/1, providing for a substantial increase of the limits imposed by the Warsaw/Hague regime to at least SDR 250,000, which Recommendation urged carriers to enter into an inter-carrier agreement along the lines of the Montreal Agreement of 1966;

In 1995, the adoption of the IATA Inter Carrier Agreement on Passenger Liability ("IIA"), provided for the abolition of limits of liability for recoverable compensatory damages pertaining to injury or death to passengers;

In 1996, the adoption of the Agreement on Measures to Implement the IATA Inter Carrier Agreement ("MIA") introduced unlimited liability as well as strict liability in respect of claims up to SDR 100,000 for carriers having signed MIA (*See also* the above "Japanese initiative.");

In 1997, the US Department of Transport issued Order 97-1-2 granting approval to the IIA and MIA agreements of IATA subject to the condition that the optional provision in MIA that a regime of strict liability be imposed for damages below SDR 100,000 on particular routes would not apply for any operations to, from, or with a connection or stopping place in the United States. Also, in 1997, the EC adopted EC Regulation 2027/97 on air carrier liability in the event of accidents, which Regulation is currently in the process of being amended. *See also* hereafter.

- 2) the establishment of yet another protocol, amending the Warsaw Convention in certain limited respects, such as: the basis for liability for damages in excess of the generally accepted level of SDR 100,000 for passenger injury and death, the so-called "fifth jurisdiction," the possibility to break through liability limitations for cargo, baggage and personal effects, and modernized provisions for documentation and notice;² and
- 3) the abolition of the aviation-specific conventional approach, and the solution to legal questions about international air carriage by international private law and private arrangements between carriers and their clients with a broad freedom to contract between the parties involved.³

Although it is challenging to explore each of these options, in 1999, the decision was made to establish a new worldwide convention. It may take some years before the 30th instrument of ratification, acceptance, approval, or accession to be received by the ICAO.⁴ At the time of writing, the Montreal Convention had received seven ratifications. Until the 30th ratification occurs, we must live with the *status quo*.

Obviously, treaty relationships will become complicated as the interim period progresses. The interim may last a rather long time, and during this period, the treaties of the "Warsaw System" will continue to exist alongside the Montreal Convention. These complex treaty relationships will confuse lawyers and judges even more, which certainly does not enhance the desired uniformity. Although the IIA/MIA and EC Regulation 2027/97 resolved the problem of low liability limits, the much-desired uniformity is farther away than ever. Carriers will now be subject to a wide variety of liability regimes: Warsaw, Warsaw/

² See George N. Tompkins, *The Future for the Warsaw Convention Liability System*, THE AVIATION Q. 38, 43 (1999).

³ See Convention for the Unification of Certain Rules for International Carriage by Air, done May 28, 1999, ICAO Doc. 9740 [hereinafter Montreal Convention]. The Montreal Convention includes a provision on the "Freedom to Contract," where freedom is restricted by the provision that contractual arrangements entered into between the carrier and the passenger may not conflict with the provisions of the Montreal Convention. This provision is precisely designed to give guidance to the contractual arrangements to be made between the parties. See *id.* at art. 27.

⁴ See Montreal Convention, *supra* note 3, at art. 53(6) (explaining that the Montreal Convention will enter into effect on the 60th day following the 30th ratification).

Hague, Montreal Inter-Carrier Agreement 1966, IIA/MIA, EC Regulation 2027/97, or a combination of these instruments.

Thus, it seems inevitable that we must pass through another stage of “patchwork” application of different regimes before a single convention will govern contractual relationships between the air carrier on the one hand and the passenger or shipper on the other. This eagerly anticipated single convention is the Montreal Convention, some aspects of which will be discussed further below.

The purpose of this contribution is not to exhaustively describe the contents of the Montreal Convention. Only the issues that have significantly changed in the Montreal Convention compared to the status quo under the Warsaw system will be discussed.

II. PASSENGER LIABILITY

A. DOCUMENTARY ISSUES

Regarding the carriage of passengers by air, Article 3(1) of the Montreal Convention states that “an individual or collective, document of carriage” must be delivered. The collective document, which may be useful for charter operations, was not provided for in the ticket requirements of Article 3 WC/HP.⁵ The “Hague Notice” of Article 3(1)(c) WC/HP must no longer be mentioned under Article 3 MC, and liability limits continue to apply in the event of non-compliance with the documentary requirements.⁶ Under Article 3(2) MC, traditional passenger tickets may be replaced by electronic ticketing systems.

B. THE “FIFTH JURISDICTION”

One of the major innovations of the Montreal Convention is the so-called “fifth jurisdiction,” which was added to the four jurisdictions already available under Article 28 WC.⁷ The four

⁵ See ELMAR GIEMULLA, RONALD SCHMID, WOLF MÜLLER-ROSTIN AND P. NICOLAI EHLERS, *WARSAW CONVENTION*, art. 3 § 10 (Kluwer Law International 2000).

⁶ See Montreal Convention, *supra* note 3, at art. 3(5).

⁷ In the framework of the preparation of EC Regulation 2027/97, the European Commission had already suggested the provision of a fifth jurisdiction, but this proposal was not retained in the final draft of the Regulation. See 1997 O.J. (C 29) 10; see also CHRISTOPHER SHAWCROSS & MAJOR BEAUMONT, § 226 (Martin et al. eds., 4th ed., Butterworths 2000) (1977). It has been argued that the provision for a fifth jurisdiction is contrary to Article 32 WC which declares null and void “any clause contained in a contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules

Warsaw Convention jurisdictions are now provided for in Article 33(1) MC. The "fifth jurisdiction" was inserted in Article 33(2) MC and is drawn from Article 28 WC/GCP.⁸ The rather straightforward definition of jurisdiction in Article 28 WC/GCP has been transformed into the complex wording found in Article 33(2) MC:

In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

"Commercial agreement" and "principal and permanent residence" are defined in Article 33(3) MC.⁹

laid down by this convention, [. . .] by altering the rules as to jurisdiction . . .," and that the addition of a fifth jurisdiction would only be possible by revising the Warsaw Convention. (See M. Godfroid and P. Frühling, *Le Nouveau Régime de Responsabilité des Transporteurs Aériens Envers les Voyageurs* [The New Liability Regime of the Air Carrier with Respect to the Passenger], *REVUE GÉNÉRALE DES ASSURANCES ET DES RESPONSABILITÉS*, at 12945(6) (1998); SHAWCROSS & BEAUMONT, *supra* note 7, § 207. It remains, however, to be seen whether an EC regulation can be characterized as a "clause contained in a contract" or a "special agreement entered into before the damage occurred" as set forth by Article 32 WC. This question appears to be related to the validity of EC Regulation as challenged in 1999. See *infra* note 42.

⁸ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on October 12, 1929, as amended by the Protocol done at the Hague on September 28, 1955, signed at Guatemala City, on March 8, 1971, art. XX [hereafter WC/GCP]. The original text of Article 28 WC/GCP stated: "In respect of damage resulting from the death, injury or delay of a passenger or the destruction, loss, damage or delay of baggage, the action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of one of the High Contracting Parties, before the Court within the jurisdiction of which the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of the same High Contracting Party." The Guatemala City Protocol of 1971 never entered into effect.

⁹ Montreal Convention, *supra* note 3, at art. 33(3) (stating that "For the purposes of paragraph 2, (a) 'commercial agreement' means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air; (b) 'principal and permanent residence' means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be a determining factor in this regard.").

It follows from these definitions in the Montreal Convention, that in addition to the four traditional jurisdictions of the Warsaw Convention currently provided for in Article 33(1) of the MC,¹⁰ a fifth jurisdiction is available based on the passenger's place of residence. However, the following six qualifications must be considered:

1. Only death and bodily injury claims

The "fifth jurisdiction" is only available for claims based on death or injury, whereas the four jurisdictions of Article 33(1) MC concern any passenger or cargo claim. In comparison to the Montreal Convention, the Guatemala City Protocol also provided a "fifth jurisdiction" not only for passenger delay, but also, for claims based on baggage loss, destruction, damage, or delay.

Consequently, the "fifth jurisdiction" of Article 33(2) MC does not apply to baggage claims. In the event of a claim for death or injury where baggage is also lost or destroyed (for example, following a crash), the baggage claim must be brought before one of the four jurisdictions in Article 33(1) MC, and cannot be presented before a court in the passenger's principal and permanent residence.¹¹

2. Right of the passenger to choose a jurisdiction

Actions for damages in the four jurisdictions in Article 33(1) MC "must be brought, at the option of the plaintiff" before one of the four indicated jurisdictions, whereas actions for damages "may be brought" in the "fifth jurisdiction." Case law confirms that only the consignor can choose in which of the four jurisdictions in Article 28 WC a claim may be initiated against a carrier, and if the carrier itself takes legal action against a consignor, such legal action cannot affect the consignor's choice of jurisdiction granted by Article 28 WC.¹² Given the wording of Article 33(2) MC, it is questionable whether such case law applies equally to the right of a passenger to choose to bring a legal

¹⁰ *Id.* at art. 33(1) (describing the four jurisdictions as (1) the domicile of the carrier, (2) the principal place of business of the carrier, (3) the place of business through which the contract has been made, and (4) the place of destination).

¹¹ See Wolf Müller-Rostin, *The Montreal Convention of 1999: Uncertainties and Inconsistencies*, THE AVIATION Q. 218, 223 (2000).

¹² Which led the court seized by the carrier, while the consignor chose subsequently to seize another Article 28 WC court to decline jurisdiction. See TRIB. COMM. BRUSSELS, Sept. 21, 1998, ANTWERP MARITIME LAW REVIEW [A.M.L.R.] 68, 75-77 (1999).

action in the "fifth jurisdiction" after the carrier has initiated proceedings in one of the courts referred to in Article 33(1) MC.

3. *The "fifth jurisdiction" must be in a State Party*

Despite the apparent concern that passenger victims be allowed to sue a carrier in the jurisdiction of their principal and permanent residence, such residence must be located in the territory of a State Party. Moreover, only the passenger's principal and permanent residence at the time of the accident is taken into account.

Particularly in the early days of the Montreal Convention,¹³ there is a great likelihood that a victim willing to sue a carrier before a "fifth jurisdiction" may be unable to do so because the principal and permanent residence of the victim is not based in a State Party. The Montreal Convention makes few changes to the existing Warsaw system (with the exception of the "fifth jurisdiction"), which will, for the time being, stay in place together with the new Montreal Convention.¹⁴ These considerations may compel some states to simply remain a party to the Warsaw system rather than immediately becoming a party to the Montreal Convention. Consequently, the early days of the Montreal Convention may last for quite some time.

4. *The carrier must operate in the "fifth jurisdiction"*

The victim's principal and permanent residence must be located in a State Party (1) to or from which the sued carrier operates services for the carriage of passengers¹⁵ (either on its own aircraft or on another carrier's aircraft under a code-share agreement); and (2) in which the sued carrier conducts its business of carrying passengers by air from premises leased or owned by that sued carrier or by another carrier with which it has a commercial agreement other than an agency agreement. The wording of the provision suggests that the other carrier with whom the sued carrier has entered into a commercial agreement need not necessarily be the same carrier as the first code-

¹³ See Montreal Convention, *supra* note 3.

¹⁴ See George N. Tompkins, *The Future for the Warsaw Convention Liability System*, THE AVIATION Q. 38, 38 (1999); Harold Caplan, *A Second Supplement for the Warsaw Convention: an Historic Opportunity*, THE AVIATION Q. 70, 70-76 (1999).

¹⁵ The services for carriage of cargo are apparently not taken into consideration.

share partner that operates services to or from the State Party of the victim's principal and permanent residence.¹⁶

It is unclear whether the code-share partners operating the services and conducting the business need to be involved in the accident giving rise to the claim.¹⁷ In addition, the reference to this other carrier under a commercial agreement appears to be linked tightly with the premises where the business of carriage by air is conducted. Although the provision clearly refers to the "business of carriage by air," this clause must not be construed too narrowly because carriage by air clearly occurs only in an aircraft and not in premises. Therefore, premises in which ancillary activities are performed, such as the maintenance of a passenger aircraft fleet, may also qualify as "premises in which the sued carrier conducts the business of carriage of passengers by air."¹⁸

This construction of "premises in which the sued carrier conducts the business of carriage of passengers by air" may easily extend to websites in the event of tickets being offered on-line, or to call centers through which tickets are offered. Thus, the application of Article 33(2) MC may lead to an inquiry about the geographical location of a website from which tickets or other services ancillary to carriage by air are offered.

¹⁶ For instance if carrier X, through a code-share agreement with carrier Y, operates flights to Country A, without selling tickets in A on the one hand, and has on the other hand code-share agreements with carrier Z, which also operates flights to Country A (for which carrier X does offer tickets in Country A, through carrier Z), an accident involving a resident of A on the X/Y flight may allow that passenger to sue X in Country A, if the first and the second code share partner must not be the same.

¹⁷ If a code-share partner must not be involved, and carrier X in the same example operates yet another code-share flight with carrier Y for flights to Country B, a resident of Country A, may sue carrier X in Country A for an accident on the X/Y flight to Country B, on the basis of the operation by carrier X of services to Country A with carrier Y and with carrier Z, and on the basis of the conducting by carrier X of business in Country A through carrier Z. Pursuant to Article 46 MC, incorporating Article VIII of the Guadalajara Convention, this jurisdiction may even be extended further, making carriers which are member to an alliance vulnerable to jurisdiction in any of the states in which the other members of the alliance are established.

¹⁸ Sean Gates, *The Montreal Convention of 1999: A Report on the Conference and What the Convention Means for Air Carriers and Their Insurers*, THE AVIATION Q. 186, 188 (1999). Gates has even suggested that, as many airlines have rooms in the Boeing Airplane Company for the monitoring of the construction of aircraft, which they have ordered, Seattle could qualify as a "fifth jurisdiction."

5. *Only one permanent residence*

Regardless of the victim's nationality, principal and permanent residence refers to the single victims' fixed and permanent abode at the time of the accident. Because passengers who are meant to benefit from the "fifth jurisdiction" are highly mobile persons, problems will arise if a passenger has two houses in different countries, or if a passenger with only one house is seconded to another country for a certain period of time, but intends to return to his or her home country at some later date.

6. *Relative importance of the "fifth jurisdiction" compared to the existing four jurisdictions*

The aim of the fifth jurisdiction is to allow highly mobile individuals, such as temporary expatriates, to sue carriers in their home country. However, the number of passengers who may benefit from Article 33(2) MC will be relatively small.¹⁹ If a passenger buys a one-way ticket to his or her home country, the place of destination will be a sufficient basis for jurisdiction under Article 33(1) MC. If the one-way ticket is purchased in the home country for a destination abroad, Article 33(1) MC gives jurisdiction to the court of the place where the contract for carriage has been made. If a round-trip ticket is purchased in the home country, the place of destination will coincide with the point of departure, which means the passenger may also sue in his or her home country. Only when a round-trip ticket is bought abroad will the "fifth jurisdiction" have a significant use.

C. DEATH AND BODILY INJURY — AND MENTAL INJURY?

Article 17(1) MC provides for the liability of the carrier "for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking."²⁰

The wording of Article 17(1) MC differs from Article 17 WC, which provides for liability of the carrier for damage "sustained in the event of the death or wounding of a passenger or any

¹⁹ Harold Caplan, *A Second Supplement for the Warsaw Convention: An Historic Opportunity*, THE AVIATION Q. 70, 74 (1999).

²⁰ See Montreal Convention, *supra* note 3, at art. 17(1).

other bodily injury suffered by a passenger.”²¹ Article 17 WC/GCP, on the other hand, describes the liability of a carrier for “damage sustained in case of death or personal injury of a passenger.”²²

The wording of Article 17(1) MC was a major topic of discussion at the Montreal Conference. Views clashed on the question of whether mental injuries, in the absence of any bodily injury, would be recoverable.²³

The “personal injury” referred to in Article 17 WC/GCP appears to include mental injuries.²⁴ It has also been argued that the “Hague notice” of Article 3(1)(c) WC, which refers to a “personal injury,” must equally include moral damages, and that moral damages are therefore also included in Article 17 WC. Because the “Hague notice” of Article 3(1)(c) WC is not retained in Article 3(1) MC,²⁵ this argument is no longer valid for liability under the Montreal Convention.

U.S. case law is unequivocal on the question of whether pure mental distress can be compensated under the Warsaw Convention;²⁶ according to other views, however, the authentic French text of the Warsaw Convention which sets out liability “en cas de mort, de blessure ou toute autre lésion corporelle subie,” must be read as only distinguishing between wounding (“blessure”) on the one hand and bodily injury (“lésion corporelle”) on the other. Because “lésion corporelle” would include all damage suffered personally (as opposed to asset-related damage),

²¹ Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter WC].

²² See WC/GCP, *supra* note 8, at art. 17.

²³ See THE AVIATION Q., 51 (2000).

²⁴ See GIEMULLA, *supra* note 5, at art. 17, § 6.

²⁵ See Montreal Convention, *supra* note 3, at art. 3(1).

²⁶ See, e.g., *Eastern Airlines v. Floyd*, 499 U.S. 530 (1991); *Terrafranca v. Virgin Atl. Airways Ltd.*, 151 F.3d 108 (3d Cir. 1998); *Croucher v. Worldwide Flight Servs., Inc.*, 111 F.Supp.2d 501 (D.N.J. 2000); *Fields v. BWIA Int'l Airways Ltd.*, No. 99-CV-2493(JG), 2000 U.S. Dist. LEXIS 9397 (E.D.N.Y. 2000) (with respect to the exclusion to recover damages for pure emotional distress caused by delay under Article 19 WC). For an application of an emotional injury damage award (\$150,000 USD for each of 13 passengers who suffered 30 seconds of fright) in a domestic flight (non-Warsaw) case, see *Spielberg v. Am. Airlines Inc.*, 105 F.Supp.2d 280 (S.D.N.Y. 2000). For a Warsaw application, see *Lloyd v. Am. Airlines Inc.*, 118 F.Supp.2d 916 (E.D. Ark. 2000).

mental distress would be included.²⁷ It appears however, that the concept of non-asset related damage is normally not defined as “lésion corporelle,” but as “dommage corporel.” “Dommage corporel” is divided into “dommage matériel” (meaning, physical injuries suffered) and “dommage moral” (meaning, moral distress).²⁸ The question may, therefore, be raised whether “lésion corporelle” may be considered to include “dommage moral,” as the term “lésion” suggests a more physically visible form of injury and appears to be one of the forms of “dommage matériel” rather than a form of “dommage moral.”

In a recent decision of the First Division of the Inner House of the Court of Session, the application of Article 17 WC was debated in great detail.²⁹ In *Philip King v. Bristow Helicopters*, Mr. King sued the defendant for his injuries, including posttraumatic stress disorder, insomnia and nightmares stemming from the heavy landing of a helicopter on a production platform in a North Sea oil field. He filed suit under the Carriage by Air Acts Order of 1967, which repeats the Warsaw Convention. Therefore, the court’s reasoning fully applies the provisions in Article 17 WC. Lord President and Lord Cameron of Lochbroom both agreed that pure mental distress may be compensated under Article 17 WC. But Lord Reed, in a dissenting opinion, argued that there is no convincing evidence that the drafters and signatories to the Warsaw Convention intended to include pure mental distress in Article 17 WC.

Other legal authors seem to include mental distress in Article 17 WC based on Article 24 WC (now Article 29 MC), which states that

any action for damage [in the case covered by Article 17] however founded, can only be brought subject to the conditions and limits set forth in this Convention [. . .] without prejudice to the

²⁷ See GIEMULLA, *supra* note 5, at art. 17, § 6; FRANS PONET, DE OVEREENKOMST VAN INTERNATIONAAL LUCHTVERVOER [THE AGREEMENT FOR INTERNATIONAL AIR TRANSPORT] 103 § 263 (Kluwer Rechtswetenschappen 1985).

²⁸ See JEAN-LUC FAGNART & ROBERT BOGAERT, LA RÉPARATION DU DOMMAGE CORPOREL EN DROIT COMMUN [THE COMPENSATION OF BODILY DAMAGE UNDER GENERAL PRINCIPLES OF LAW], at 13 (Larcier 1994). Good references for a similar analysis can be found in Lord Reed’s dissenting opinion in *Philip King v. Bristow Helicopters Ltd.*, who cites Savatier, Tunc, Ripert and Proust. See *infra* note 29.

²⁹ See *Philip King v. Bristow Helicopters Ltd.*, Court order of July 12, 2000, available at http://www.scotcourts.gov.uk/opinions/01489_5_95.html. The opinions of Lord President, Lord Cameron of Lochbroom, and Lord Reed provide a very detailed overview of the arguments in favor of and against the inclusion of mental distress claims in Article 17 WC.

question who are the persons who have the right to bring suit and what are their respective rights.³⁰

According to these authors, Article 24 WC allows for the law of the relevant jurisdiction to determine which damages may be compensated, including the question of whether moral distress can be compensated.³¹ This view appears to be supported by a 1996 U.S. Supreme Court case that confirms that a plaintiff can sue for “legally recognizable harm” to be determined by local law according to otherwise applicable choice of law principles.³²

However, the new wording of Article 29 MC adds some words to the first sentence of Article 24 WC, stating that “in any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.” This restriction focuses only on damage that does not coincide with “equitable compensation based on the principle of restitution.”³³ Therefore, compensation for mental injury, not being expressly excluded in Article 29 MC, and not being contrary to the principle of restitution, can be reconciled with Article 29 MC.³⁴ The working papers of the Study Group appointed by the ICAO Council in 1995, which were used to prepare the Montreal Convention, express the Group’s concern about including “impairment of health” (such as mental injury) as recoverable damage, while excluding other strictly personal damage such as libel. In the approved version of Article 17(1) MC, mental injury has been deleted. It has been argued that simply deleting mental injury from the Montreal Convention may not lead to the obvious conclusion that mental injury is not recoverable. The inclusion of the concept of “impairment of health” as a recoverable injury in the working

³⁰ JACQUES NAVEAU & MARC GODFROID, *PRÉCIS DE DROIT AÉRIEN* [AIR LAW TREATISE] 202 § 149 (Bruylant 1988); MAX LITVINE, *DROIT AÉRIEN – NOTIONS DE DROIT BELGE ET DE DROIT INTERNATIONAL* [AIR LAW – NOTIONS OF BELGIAN AND INTERNATIONAL LAW] 204 § 88 (Bruylant 1970).

³¹ See Ingrid Opdebeek, *De Aansprakelijkheid van de Luchtvervoerder Voor de Door Hem Vervoerde Reizigers, Zoals Geregeld Door het Verdrag van Warschau* [The Liability of the Air Carrier for Goods Transported, as governed by the Warsaw Convention], *RECHT-SKUNDIG WEEKBLAD* [R.W.] 1393, 1401 (1985-86).

³² *Zicherman v. Korean Air Lines Co. Ltd.*, 516 U.S. 217 (1996); SHAWCROSS & BEAUMONT, *supra* note 7, at §§ 525, 543.

³³ See Montreal Convention, *supra* note 3, at pmbl.

³⁴ See Harold Caplan, *Novelty in the New Convention*, *THE AVIATION Q.* 193, 197 (1999).

papers may mean that damage to mental health may still be compensated.³⁵

D. (UN)LIMITED LIABILITY AND DEFENSES

1. *Short overview of existing liability schemes*

Under Article 22(1) WC/HP, an air carrier's liability is limited to 250,000 francs Poincaré (that is, \$20,000 USD). The limits on liability in Article 22(1) WC/HP do not apply if the carrier can be shown to have been reckless or have committed an act of wilful misconduct.³⁶ Despite the presumption of liability in Article 17 WC, the carrier may raise the defense of "all necessary measures" in Article 20(1) WC/HP.³⁷ Under Article 21 WC, the defense of contributory negligence is also available to the carrier.³⁸

This traditional Warsaw Convention liability system, as amended by the Hague Protocol, has been changed over time by various legal instruments. The Montreal Inter-carrier Agreement on Passenger Liability of 4 May 1966, agreed to by a number of air carriers, could ultimately prevent the effective entry into effect of the denunciation of the Warsaw Convention by the United States of America. Under the Montreal Agreement, participating carriers agreed to raise the limit on liability in Article 22(1) WC/HP to USD \$75,000 for international air carriage to or from the United States.³⁹

Other legal instruments have reached similar results. Within the framework of the undisclosed agreement of Malta, a number of European carriers have agreed to raise their limit on liability to USD \$58,000 and later, SDR 100,000.

³⁵ See Ruwantissa I.R. Abeyratne, *Mental Injury Caused in Accidents During International Air Carriage – A Point of View*, THE AVIATION Q. 206, 229 (1999); Sean Gates, *The Montreal Convention of 1999: A Report on the Conference and What the Convention Means for Air Carriers and their Insurers*, THE AVIATION Q. 186, 190 (1999); see also the report in THE AVIATION Q. 51-53 (2000).

³⁶ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929, done at the Hague on September 28, 1955, art. 25A [hereinafter WC/HP].

³⁷ *Id.* at art. 20(1).

³⁸ See Warsaw Convention, *supra* note 21, at art. 21.

³⁹ This agreement is based on Article 22(1) WC/HP, which expressly provides for the possibility for carriers to agree, in the framework of their general conditions of carriage, on such higher liability limits: "Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability." The validity of the Malta Agreement, IIA, and MIA are also based on Article 22(1) WC/HP.

In 1992, within the framework of the so-called "Japanese Initiative," Japanese carriers amended their general conditions of carriage to unlimited liability and set up a strict liability scheme for damages up to SDR 100,000. The IATA Inter-carrier Agreement of October 31, 1995, (IIA) and the Implementing Agreement of February 1, 1996, (MIA), agreed to by a number of air carriers, provide for (1) no limitation on the carrier's liability (meaning Article 22(1) WC/HP is not applied); (2) the waiver of the "all necessary measures" defense under Article 20(1) WC/HP for the first tier of liability of SDR 100,000; and (3) maintenance of the defense of contributory negligence.

EC Regulation 2027/97 of October 9, 1997 applies to international and domestic air carriage by Community air carriers.⁴⁰ A Community air carrier is an air carrier to which an AOC under Regulation 2407/92 has been delivered.⁴¹ The main features of the Community scheme include: (1) no liability limits (as set forth by article 22(1) WC/HP); (2) the "all necessary measures" defense of Article 20(1) WC/HP is not available for the first liability tier of SDR 100,000; (3) contributory negligence is available throughout; and (4) an advance payment of at least SDR 15,000 must be paid within 15 days after the establishment of the identity of a victim.

Community air carriers must describe in their general conditions the potential liability under Regulation 2027/97 and expressly state that advance payments may be required. Air carriers established outside the European Union operating flights to, from, or within the European Union that do not apply the liability system of the Regulation must specify that they do not apply that system.

Meanwhile, Regulation 2027/97 has been challenged in the English courts on the basis that it does not comply with the Warsaw Convention.⁴²

⁴⁰ Council Regulation 2027/97 of October 9, 1997 on Air Carrier Liability in the Event of Accidents, 1997 O.J. (L 285) 1.

⁴¹ Council Regulation 2407/92 of July 23, 1992 on Licensing of Air Carriers, 1992 O.J. (L 240) 1.

⁴² EC Regulation 2027/97 has been challenged before the High Court in England by IATA. On April 21, 1999, Jowitt J. found in *R. v. Secretary of State for Transport, the Environment and the Regions ex parte IATA*, that EC Regulation 2027/97 conflicts with the Warsaw Convention. In application of Article 307 (ex Article 234) of the EC Treaty, EC Regulation 2027/97 was considered to be suspended (reported and discussed in John Balfour, *Council Regulation (EC) 2027/97 on Air Carrier Liability – A Tale of Suspense*, THE AVIATION Q. 175, 175 (1999)); SHAWCROSS & BEAUMONT, *supra* note 7, at § 241.1.

The European Commission has proposed a regulation amending Regulation 2027/97 to ensure full and simultaneous compliance with the Montreal Convention by Community air carriers.⁴³ The amendments implement the provisions of the Montreal Convention regarding passenger liability, essentially extending to the Community scheme on baggage and delays.⁴⁴ Cargo liability remains unregulated by the proposed amendment to Regulation 2027/97.

The amended Regulations 2027/97 contains several noteworthy provisions. First, in general, all references to the Warsaw Convention are replaced by references to the relevant provisions of the Montreal Convention. Second, only natural persons fall within the scope of "persons entitled to compensation."⁴⁵ Third, the liability scheme for death and personal injury as set forth in Article 3 of Regulation 2027/97 is replaced by a simple reference to Articles 17, 20, and 21 MC. Fourth, new Article 3(a) provides that "the liability of a Community air carrier for damage caused by delay and in the case of destruction, loss, damage or delay in the carriage of baggage shall be governed by the provisions set out in Articles 19, 20, 22(1), (2), (5) and (6) and 31 [of the Montreal Convention]." There is no reference to Article 17 MC. Consequently, in cases where the Montreal Convention does not apply but Regulation 2027/97 does (for example, domestic flights within Community Member States), it is unclear (1) whether the Community air carrier is liable for damage to, or loss of baggage, simply because the event causing the damage or loss took place on board the aircraft or while the baggage was in the carrier's care and control; (2) whether the defense of inherent defect in Article 17(2) MC applies; (3) whether a distinction applies between checked baggage and unchecked baggage for which the carrier's negligence must be proved; and (4) whether the passenger must observe the requirement in Article 31 MC (to which an express reference is made) that a complaint must be in writing for lost checked baggage.⁴⁶

⁴³ Proposal for a Regulation of the European Parliament and of the Council Amending Regulation No. 2027/97 on Air Carrier Liability in the Event of Accidents, COM (00) 340.

⁴⁴ The title of Regulation 2027/97 will also be changed in "Regulation 2027/97 on air carrier liability."

⁴⁵ See Amended Council Regulation 2027/97, art. 2(1)(c), COM (00) 340.

⁴⁶ Reference is made to the description of the baggage liability system under Article 17 MC.

As amended, Regulation 2027/97 also states that the advance payment in the event of death is raised to SDR 16,000.⁴⁷ Information on the liability system under Regulation 2027/97 for death and personal injury, delay, baggage and the requirement for advance payments, must be made available to passengers as “adequate information” at the Community air carrier’s agencies, points of sale and check-in counters, and also at its travel agencies.⁴⁸ The reference to points of sale may include carrier’s web sites, which offer tickets on-line. It remains unclear whether “travel agencies” means travel agencies affiliated to Community air carriers or those which can simply sell the tickets of the carrier concerned. As far as IATA members are concerned, it may not be possible to control the number of IATA approved travel agencies that simply sell the tickets of carriers.

Another provision in the amended regulation is that non-Community air carriers must give passengers who purchase tickets in the Community information about any limits, which may apply for personal injury, death, damage to or loss of baggage, and delay.⁴⁹ Non-Community carriers who sell tickets outside the Community are not subject to this obligation. Again, it would have been helpful to specify how to determine whether tickets sold on-line or through call centres are sold inside or outside the Community.

The amended Regulation also states that non-compliance with this obligation “shall not affect the existence or validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Regulation.”⁵⁰ It appears that this provision, like Articles 3(2) and 4(2) WC/HP, subjects a non-complying non-Community air carrier to a liability system to which it would not be subject if it complied with the information requirements. If this is what the Commission intends, it is recommended that the drafting be clearer.⁵¹

⁴⁷ See Amended Council Regulation 2027/97, art. 5(2), COM (00) 340.

⁴⁸ See *id.* at art. 6(2).

⁴⁹ See *id.* at art. 6(3).

⁵⁰ *Id.*

⁵¹ A possible wording to that effect could be: “Non-compliance with the provisions of paragraph 3 shall not affect the existence or the validity of the contract of carriage, but the liability of the non-complying carrier for damage sustained in case of death or bodily injury of a passenger, where the event which caused the accident took place on board the aircraft or in the course of any of the operations of embarking or disembarking, for damage caused by delay, and in case of destruction, loss, damage or delay in the carriage of baggage, shall, nonetheless, be subject to the rules of this Regulation.”

2. Consolidation in the Montreal Convention

Article 21(1) MC prohibits a carrier from excluding or limiting its liability for damages up to SDR 100,000. For damages exceeding SDR 100,000 under Article 21(2) MC, the carrier is not liable if it can prove that “(a) such damage [is] not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or (b) such damage [is] solely due to the negligence or other wrongful act or omission of a third party.”⁵² Thus, the Montreal Convention provides a system of strict liability for the first tier of SDR 100,000 for which the defense in Article 21(2) MC is not available.

In addition, the limit on liability in Article 22(1) WC has been removed from the Montreal Convention, which accordingly sets out a system of unlimited liability for passenger injury claims (tempered by the defense in Article 21(2) MC for liability exceeding SDR 100,000). The carrier is also presumed to be liable for the second tier of damages exceeding SDR 100,000.

For both the first tier of SDR 100,000 and the possibility of exceeding this liability, the defense of contributory negligence in Article 21 WC is restated in Article 20 MC. The more detailed text in Article 20 MC remedies the required construction of the “injured party” in Article 21 WC, which must be read as referring to passenger and baggage claims, cargo claims and delays.⁵³

The exclusion of the “all necessary measures” defense (as adapted in Article 21(2) MC) for a carrier’s liability not exceeding SDR 100,000 had already been contractually achieved in IIA, in MIA and by Article 3(2) of EC Regulation 2027/97. This defense survives in the Montreal Convention for the second tier of liability above SDR 100,000, but has been converted into a “no negligence” defense with the alternative of proving that the damage was solely due to a third party.⁵⁴ It has been said that this alternative is redundant because the “no negligence” defense would also apply to situations for which only a third party is responsible, and be equally effective.⁵⁵ However, others have indicated that it may be difficult to judge when a carrier has acted negligently (for example, by not sufficiently checking a manufacturer’s maintenance instructions) whereas a third party (namely, the manufacturer) may be held solely responsible in

⁵² Montreal Convention, *supra* note 3, at art. 21(2).

⁵³ See GIEMULLA, *supra* note 5, at art. 21, § 11.

⁵⁴ See Montreal Convention, *supra* note 3, at art. 21(2)(a)-(b).

⁵⁵ See Caplan, *supra* note 34, at 202.

the same set of circumstances.⁵⁶ The transformation of the “all necessary measures” defense found in Article 20 WC, IIA and MIA and EC Regulation 2027/97,⁵⁷ into the “no negligence” defense of Article 21(2) MC, benefits the carrier because it is easier to satisfy the burden of proof.⁵⁸

Unlike under IIA and MIA, “non-family claims” by public social insurance or similar bodies under the Montreal Convention are not excluded from invoking the strict liability of the first tier of SDR 100,000 and unlimited liability if this is exceeded.⁵⁹ It has been rightfully observed that the absence of a reservation in that sense may lead to social insurance agencies and employers claiming strict and unlimited liability against carriers. Meanwhile, extending the liability of carriers to the benefit of social security agencies and employers is not supported by “the importance of ensuring protection of the interests of consumers in international carriage.”⁶⁰ If the intention had been to exclude “non-family claims” from the strict and unlimited liability system, it would have been helpful to restrict compensation for passenger injury to “natural persons,” the term used in Article 28 MC for advance payments.⁶¹

E. BAGGAGE

A distinction is made between checked and unchecked baggage.

1. *Liability for checked baggage*

Under Article 3(3) MC, the carrier must produce a “baggage identification tag for each piece of checked baggage.”⁶² However, if this requirement of the Montreal Convention is not complied with, it may have little consequence for the carrier. Article

⁵⁶ See Gates, *supra* note 18, at 190.

⁵⁷ The proposed amendment to Regulation 2027/97 refers to Article 21 MC and also provides a “no negligence” defense.

⁵⁸ See Gates, *supra* note 18, at 190.

⁵⁹ See Amended Council Regulation 2027/97, art. 2(1)(c), COM (00) 340. Social security agencies are within the definition of a “person entitled to compensation.” See *id.* at art. 5(1). Social Security agencies are excluded from advance payments in that provision. In the proposed amendment to Regulation 2027/97, a “person entitled to compensation” means “a passenger or any natural person entitled to a claim in respect of that passenger, in accordance with applicable law,” which appears to exclude “non family claims.”

⁶⁰ Montreal Convention, *supra* note 3, at pmbl.

⁶¹ Caplan, *supra* note 34, at 205.

⁶² Montreal Convention, *supra* note 3, at art. 3(3).

3 MC is based on Article 4 WC, and this provision states that not issuing a baggage check (which has become a baggage tag in the Montreal Convention) precludes the carrier from availing himself of the liability limits under Article 22(2) WC. Like Article 4(2) WC, Article 3(5) MC states that if a baggage tag is not produced, the existence or validity of the contract of carriage is not affected, but under the Montreal Convention, it does not prevent the carrier from applying the liability limits in Article 22(2) MC.⁶³

The carrier is liable for (1) destruction, (2) loss of checked baggage, and (3) damage to checked baggage, if the event, which caused the destruction, loss or damage, occurred while the baggage was in the carrier's care and control. However, under Article 17(2) MC, the carrier can exclude its liability "if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage."⁶⁴ Defective packing is not a valid defense under Article 17(2) MC, and it appears that a carrier cannot rely on this defense to exclude liability for checked baggage.⁶⁵ As for baggage in general, it is the passenger, not the carrier, who is responsible for packing. The most probable solution is for the carrier, at check-in, to carry out a serious quality control verification of how baggage is packed.⁶⁶

If checked baggage is lost, Article 17(3) MC allows the passenger to enforce his or her right against the carrier if (1) the carrier admits the loss; or (2) the baggage has not arrived within 21 days after the due date.⁶⁷ The passenger's right to enforce appears to arise automatically upon the carrier's admission of loss or the expiration of 21 days. However, this automatic right conflicts with the requirement to give timely notice under Article 31(2) MC.⁶⁸ The passenger's automatic right to enforce seems to imply that claims for loss are no longer bound by the timely notice requirement in Article 31(2) MC and must be recognized as a separate class of passenger damage. Under Article 31(2)

⁶³ See *id.* at art. 3(5).

⁶⁴ See WC/GCP, *supra* note 8, at art. 17(2) (stating that "[. . .] the carrier is not liable if the damage resulted solely from the inherent defect, quality or vice of the baggage.").

⁶⁵ See Montreal Convention, *supra* note 3, at art. 17(2). But see, Montreal Protocol 4, at art. 18(3)(b); Montreal Convention, *supra* note 3, at art. 18(2)(b) (regarding cargo).

⁶⁶ In the framework of the liability system set up by Article 17(2) MC for unchecked baggage, the carrier can probably invoke insufficient packing by the passenger. See Montreal Convention, *supra* note 3, at art. 17(2).

⁶⁷ See *id.* at art. 17(3).

⁶⁸ Previously Article 26 of the Warsaw Convention.

MC, passengers whose checked baggage is lost need not make a complaint in writing within seven days of suffering the damage or within 21 days of communicating the delay to the carrier.⁶⁹ The Montreal Convention, therefore, resolves the debate concerning whether loss of checked baggage requires a written complaint under Article 26 WC.⁷⁰

However, Article 31(1) MC, which provides for the prima facie evidence value of a receipt of checked baggage without complaint, continues to apply to cases of partial baggage loss (such as theft from baggage, often discovered after the checked baggage has been received). Further, the presumption of good delivery appears to prevent the passenger from applying the right of enforcement 21 days after the due date.⁷¹ The issue of liability for theft from baggage, therefore, unfortunately remains unclear.⁷² Consequently, the requirement for a written complaint for the partial loss of checked baggage, which, though debated, already existed,⁷³ still exists under the Montreal Convention since partial loss of checked baggage may still be viewed as a case of damage to baggage.⁷⁴

The carrier's liability for checked baggage under Article 17(2) MC is not subject to the "all necessary measures" defense in Article 20(1) WC.⁷⁵ Therefore, under the Montreal Convention, the carrier's liability for checked baggage must be considered strict liability.

2. *Liability for unchecked baggage*

Under the Montreal Convention, however, the carrier is not subject to strict liability for damage to unchecked baggage and

⁶⁹ See Montreal Convention, *supra* note 3, at art. 31(2).

⁷⁰ See GIEMULLA, *supra* note 5, at art. 26 § 22; I.H. DIEDERIKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW 80 (6th ed., Kluwer Law International 1997) (citing *Dalton v. Delta Air Lines*, 638 F.2d 1233 (5th Cir. 1981) (holding that the timely notice requirement of Article 26 WC does not apply to the destruction of an entire shipment (and not simply damage or delay))).

⁷¹ See Montreal Convention, *supra* note 3, at 17(3).

⁷² See Caplan, *supra* note 34, at 199.

⁷³ See GIEMULLA, *supra* note 5, at art. 26 § 28.

⁷⁴ See NAVEAU & GODFROID, *supra* note 30, at 239, § 175; Litvine, *supra* note 30, at 251, § 107; see also M. Godfroid, *Les Transports Aériens – Chronique de jurisprudence (1983–1988)* [*Air Transport – Analysis of Case Law (1983–1988)*], REVUE DE DROIT COMMERCIAL [R.D.C.] 599, 621 § 42 (1990); SHAWCROSS & BEAUMONT, *supra* note 7, § 567.

⁷⁵ See Montreal Convention, *supra* note 3, at art. 17(2) (the "all necessary measures"-defense was already excluded under Article 20 WC/MP4.).

personal items.⁷⁶ Liability depends on the fault of the carrier, its servants, or agents.⁷⁷ It is the passenger who carries the burden of proof.⁷⁸

Under Article 18 WC, it has been argued that the question of whether a carrier is liable for damage to hand baggage depends on which state's law applies.⁷⁹ This is because Article 22(3) WC sets a limit on liability for "objects of which the passenger takes charge himself," suggesting that hand baggage must be considered covered by the contract of carriage even though Article 18(1) WC does not specifically refer to hand baggage.⁸⁰ Consequently, the liability limits in Article 22(3) WC only apply if the carrier is liable for hand baggage under national law. This position is considered to have been confirmed in writing in Article 17(2) WC/GCP, which makes the carrier liable for "damage sustained in case of destruction or loss of, or damage to baggage" bearing in mind that Article 17(3) WC/GCP defines "baggage" as "both checked baggage and objects carried by the passenger."⁸¹

The Montreal Convention now clearly provides for separate liability based on fault for unchecked baggage.⁸² Also, Article 22 MC no longer contains the specific liability limits in Article 22(3) WC for "objects, of which the passenger takes charge himself."⁸³ According to the principle of exclusive application of the Montreal Convention contained in Article 29 MC, the liability of a carrier for unchecked baggage under Article 17(2) MC

⁷⁶ See SHAWCROSS & BEAUMONT, *supra* note 7, at § 266 (for example, handbags, watches, and jewelry carried on the passenger).

⁷⁷ See Montreal Convention, *supra* note 3, at art. 17(2).

⁷⁸ See Caplan, *supra* note 34, at 199.

⁷⁹ See GIEMULLA, *supra* note 5, at § 9; LITIVINE, *supra* note 30, at 229, § 99.

⁸⁰ See Warsaw Convention, *supra* note 21, at art. 22(3). Others appear not to confirm explicitly that the carrier's liability for unregistered baggage is covered by the contract of carriage. They have argued that in the event of claims for bodily injury, liability for unregistered baggage must be based on Article 17 WC, as the unregistered baggage claim must then be viewed and "damage sustained in the event of death or wounding of a passenger." Moreover, they argue, that there is "no convincing policy reason" for restricting the liability of the carrier for unregistered baggage to cases where there is also bodily injury. See SHAWCROSS & BEAUMONT, *supra* note 7, § 582.

⁸¹ See WC/GCP, *supra* note 8, at art. 17(2), (3).

⁸² See Montreal Convention, *supra* note 3, at art. 17(2).

⁸³ *Id.* at art. 22.

must, therefore, be based on the Montreal Convention rather than national law.⁸⁴

3. *Liability limits, defenses and jurisdiction for checked and unchecked baggage*

Article 22(1) MC sets an SDR 1,000 liability limit for baggage, which under Article 17(4) MC covers both checked and unchecked baggage. The limit does not apply if the passenger made a special declaration of interest in its delivery. However, because the declaration must have been made “at the time when the checked baggage was handed over to the carrier,” it is uncertain how this limit can be increased for unchecked baggage.⁸⁵

In contrast to Article 22(3) WC/HP, which sets a separate limit on liability for unregistered baggage (5,000 francs Poincaré), the liability limit of SDR 1,000 in Article 22(1) MC is a composite limit for each passenger’s checked and unchecked baggage. The limit is no longer calculated according to weight, as was the case for checked baggage under Article 22(2a) WC/HP.⁸⁶

The defense of contributory negligence is available to the carrier for both checked and unchecked baggage.⁸⁷ According to Article 22(5) MC, the liability limit will not apply if the carrier either (1) intends to cause damage; or (2) is reckless and aware that damage will probably result. The exception to the liability limit is also known as the Warsaw/Hague Article 25-test.⁸⁸

Finally, the “fifth jurisdiction” of Article 33(2) MC does not apply to baggage claims. Consequently, if there is a claim for death or personal injury involving the loss or destruction of baggage—for example, following a crash—the baggage claim must be brought before one of the four jurisdictions in Article 33(1) MC and cannot be brought in the jurisdiction of the passenger’s principal and permanent residence.⁸⁹

⁸⁴ See NAVEAU & GODFROID, *supra* note 30, at 196 § 146; *El Al Israel Airlines Ltd. v. Tseng*, 525 U.S. 155 (1999); *Croucher v. Worldwide Flight Servs., Inc.*, 111 F.Supp.2d 501 (D.N.J. 2000); *Fields v. BWIA Int’l Airways Ltd.*, No. 99-CV-2493(JG), 2000 U.S. Dist. LEXIS 9397 (E.D.N.Y. July 7, 2000); SHAWCROSS & BEAUMONT, *supra* note 7, § 388.

⁸⁵ See Montreal Convention, *supra* note 3, at art. 22(2).

⁸⁶ Accordingly, there is no need to record the weight in the baggage check under the Montreal Convention. See SHAWCROSS & BEAUMONT, *supra* note 7, § 265.

⁸⁷ See Montreal Convention, *supra* note 3, at art. 20.

⁸⁸ *Id.* at art. 22(5).

⁸⁹ *Id.* at art. 33(2).

F. ADVANCE PAYMENTS

"In the event of aircraft accidents resulting in death or injury of passengers," the carrier must "if required by national law, make advance payments."⁹⁰ These advance payments must be sufficient to meet "the immediate economic needs of such persons."⁹¹

Article 28 MC, therefore, constitutes a genuine innovation, which was not present in the Warsaw Convention system. For some time now it has become an industry standard for airlines and insurers to provide emergency financial assistance. For this reason some have argued that it was not necessary to write this obligation into the Montreal Convention.⁹² Others have more convincingly observed that if advance payments constitute an obligation under national law, there is no need to provide for such an obligation (subject to national law) in the Montreal Convention.⁹³

It has also been argued that Article 28 MC's specific reference to "aircraft accidents" rather than simply "accidents," could be construed as more restrictive than Article 17(1) MC's "accident" language.⁹⁴ EC Regulation 2027/97 provides for compulsory advance payments for death, wounding, or other bodily injury in the event of an accident. The Regulation's provisions do not exclude injuries sustained in an accident while a passenger is in charge of the carrier, but not yet aboard an aircraft (for example, on the tarmac to board an aircraft). The obligation to make advance payments under EC Regulation 2027/97 may therefore be more far-reaching than required under the Montreal Convention.

In addition to being broader in scope, EC Regulation 2027/97's obligation to make advance payments is more precise. Without delay and, in any event, not more than 15 days after the natural person entitled to compensation is identified, a Community air carrier must make advance payments to meet the injured party's immediate economic needs⁹⁵ as calculated in proportion to the hardship suffered, and which must, in the event of death,

⁹⁰ *Id.* at art. 28.

⁹¹ *Id.*

⁹² See Caplan, *supra* note 34, at 198; Gates, *supra* note 18, at 191.

⁹³ See Müller-Rostin, *supra* note 11, at 222.

⁹⁴ See *id.* at 223.

⁹⁵ See SHAWCROSS & BEAUMONT, *supra* note 7, § 228.

be at least SDR 15,000.⁹⁶ In addition, under Article 5(3) of EC Regulation 2027/97, the carrier may recover previous advance payments if (1) there is contributory negligence by the injured passenger, or (2) the beneficiary of the advance payment contributed to the damage or does not qualify as a beneficiary.⁹⁷

III. CARGO LIABILITY

The provisions of the Montreal Convention on cargo carriage are largely based on Montreal Protocol 4.

A. DOCUMENTARY ISSUES

Under Article 4 MC, the carrier may decide not to use a conventional air waybill and instead use other (for example, electronic) means of preserving a record of carriage.⁹⁸ Under Article 5(2) WC/MP4, the consignor had to consent to this substitution, but consent is no longer required under the Montreal Convention. However, it remains the consignor's responsibility to draw up the air waybill.⁹⁹

Under Article 5(3) WC/MP4, the carrier could not refuse cargo because it is impossible to use the substituted electronic air waybill at points of transit or destination. Article 4 MC does not contain this provision, thus implying that under the Montreal Convention the carrier may refuse cargo for this reason. Indeed, under the Montreal Convention the consignor may no longer require the carrier to accept an air waybill as previously provided in Article 5(1) WC.

The air waybill must contain (1) the place of departure and destination, (2) at least one stopping place if the departure and destination are within the territory of one State Party with a stopping place in another state, and (3) an indication of the weight of the consignment.¹⁰⁰ The "Hague notice" of Article 8 WC/HP is no longer required for cargo carriage under Article 5 MC.¹⁰¹

⁹⁶ This amount is raised to SDR 16,000 in the proposed amendment to Regulation 2027/97.

⁹⁷ See Council Regulation 2027/97, art 5(3), 1997 O.J. (L 285) 1. Article 20 MC also states that an advance payment does not constitute a recognition of liability, but it does not expressly state that contributory negligence is a cause for recovery of advance payments. See Montreal Convention, *supra* note 3, at art. 20.

⁹⁸ See Montreal Convention, *supra* note 3, at art. 4.

⁹⁹ See *id.* at art. 7(1).

¹⁰⁰ See *id.* at art. 5.

¹⁰¹ *Id.*

If customs or police formalities so require, the consignor must produce a document stating the nature of the cargo.¹⁰² This obligation appears to relate to the export of cargo, as Article 16 MC requires the consignor undertake the same duty when importing cargo and delivering it to the consignee.¹⁰³

Like Article 5(2) WC, Article 9 MC states that non-compliance with the documentary requirements of the air waybill does not adversely affect the validity of the contract of carriage. However, unlike Article 9 WC/HP, the Montreal Convention liability limits will continue to apply if there is non-compliance, as the "Hague notice" is no longer required.

Article 10 MC reproduces the responsibility provisions in Article 10 WC/MP4 regarding the particulars of the cargo documentation. Both the consignor and carrier are fully liable for all damage suffered as a result of irregularities in the particulars or statements of the air waybill.

Under Article 10 WC/HP, only the consignor is liable; the carrier is not liable even when the carrier admits contributory negligence.¹⁰⁴ The liability of the consignor is strict and unlimited. Exonerating evidence is not admissible.¹⁰⁵ This unlimited liability is taken from Article 22 WC's liability limits found in Chapter III of the Warsaw Convention. Consequently, it is argued that Article 22 WC does not cover liability under Article 10 WC/HP, which is part of Chapter II of the Convention.¹⁰⁶ The same reasoning excludes the liability found in Article 10 WC/HP from the "all necessary measures" defense of Article 20 WC/HP, thereby making it strict liability, and excludes it from the jurisdiction rules and time limits prescriptions.¹⁰⁷ This argument is based on the title of Chapter III WC "Liability of the Carrier," which cannot govern the liabilities under Article 10 WC/HP as these liabilities only concern the consignor.¹⁰⁸

Under the Montreal Convention, however, not only the liability of the consignor, but also the liability of the carrier have

¹⁰² See *id.* at art. 6.

¹⁰³ See Müller-Rostin, *supra* note 11, at 219. Müller-Rostin considers Article 6 MC and Article 16 not as complementary provisions, but as referring to an identical obligation on behalf of the consignor.

¹⁰⁴ See GIEMULLA, *supra* note 5, at art. 10, § 9.

¹⁰⁵ See *id.* at art. 10, §§ 9, 21.

¹⁰⁶ See LITVINE, *supra* note 30, at 240, § 104; see also *Fed. Ins. Co. v. Yusen Air & Sea Serv. Pte. Ltd.*, 232 F.3d 312 (2d Cir. 2000).

¹⁰⁷ See Warsaw Convention, *supra* note 21, at arts. 28, 29.

¹⁰⁸ See GIEMULLA, *supra* note 5, at art. 10, § 10.

been inserted into Article 10(3) MC, thereby weakening this argument.¹⁰⁹ In the author's opinion, the liability provisions of Chapter III MC either do not apply to the consignor's or carrier's liability under Article 10 MC, or Chapter III MC applies to the liability of both entities under Article 10 MC. Given the title of Chapter III MC, "Liability of the carrier and extent of compensation for damage," the application of its provisions to the consignor's liability does not appear to correspond with its wording. The damage referred to in Article 10 MC does not always result in destruction, loss or damage to the cargo, but may simply result in additional handling costs without the cargo being physically affected. The carrier's liability for additional handling costs will possibly be governed by the strict liability of Article 10(3) MC (which is not subject to the provisions of Chapter III MC), whereas if cargo is destroyed, lost or damaged, the carrier's liability remains governed by Chapter III MC.

B. LIABILITY FOR CARGO: STRICT BUT UNBREAKABLE

1. *Short overview of the existing liability schemes*

Under Article 22(2) WC/HP, the air carrier's cargo liability limit is 250 francs Poincaré (USD \$20) per kilogram. This liability limit does not apply if a special declaration of interest at destination has been made, or if recklessness or wilful misconduct can be shown.¹¹⁰

Article 22 WC/MP4 does not provide for the defense of recklessness or wilful misconduct. Accordingly, the liability limits under Article 22 WC/MP4 are unbreakable. The Montreal Protocol 4 has set these limits at SDR 17 per kilogram. In addition the "all necessary measures" defense of Article 20(1) WC/HP is only available to the carrier if there is a delay in the transport of cargo.

2. *Consolidation in the Montreal Convention*

The carrier's cargo liability scheme has become strict because the "all necessary measures" defense of Article 20 WC is no

¹⁰⁹ It is important to recall that the application of Chapter III MC to the carrier's liability under Article 10(3) MC could not allow the carrier to invoke the "all necessary measures" defense anymore, as the carrier is strictly liable under Article 18 MC. On the other hand, cargo liability limits have become unbreakable under the Montreal Convention, thus possibly opening the door to liability under Article 10(3) MC.

¹¹⁰ See WC/HP, *supra* note 36, at arts. 22(2), 25.

longer available under the Montreal Convention. On the other hand, the applicable liability limits have become unbreakable, as the Warsaw/Hague Article 25-test (Article 22(5) MC) does not apply to cargo liability.¹¹¹ The applicable liability limit for cargo is SDR 17 per kilogram, unless a special declaration of interest at destination has been made.

Under Article 18(2) MC, the carrier can rely on the defenses in Article 20(3) WC/MP4 if there is (a) an inherent defect, quality or vice, (b) defective packing for which the carrier is not responsible, (c) an act of war or armed conflict, or (d) an act of a public authority in connection with the entry, exit or transit of cargo.¹¹² Whereas Article 20(3) WC/MP4 requires the carrier to prove that damage is "solely" due to one of these causes, the word "solely," has been omitted from Article 18(2) MC, thus lowering the threshold for proving causation.

In addition to transshipment by surface transport, Article 18(4) MC provides that if the carrier substitutes another mode of transport without the consent of the consignor, the alternate transport will be considered to fall within the period of carriage by air for the purposes of the Montreal Convention. Extending the application of Article 18 MC to unauthorized modes of transport will result in the carrier obtaining protection under the Montreal Convention.¹¹³ Nonetheless, the carrier of cargo may rely on the defense of contributory negligence in Article 20 MC.

IV. LIABILITY FOR DELAY

Under Article 19 MC, the carrier is liable for any delay if it has caused damage to a passenger or cargo. Like Article 19 WC, the passenger or person with an interest in the cargo must prove that (1) a delay has occurred (depending on what was regarded as a reasonable time for carriage, and that this time has been significantly exceeded) and (2) that this delay resulted in damage.

The "all necessary measures" defense of Article 20 WC has survived regarding delay, and this is also provided for in Article 20

¹¹¹ *But see* SHAWCROSS & BEAUMONT, *supra* note 7, § 281.

¹¹² *See* Montreal Convention, *supra* note 3, at art. 18(2).

¹¹³ Marc Godfroid, *L'étendue Dans le Temps de la Responsabilité du Transporteur Aérien en Matière de Fret* [*The Time During Which an Air Carrier of Cargo is Liable*], *REVUE DE DROIT COMMERCIAL* [R.D.C.] 92, 100 (1984); LITVINE, *supra* note 30, at 228, § 99.

WC/MP4. The contributory negligence defense in Article 20 MC also remains available to carriers for liability for delay.

A. PASSENGER LIABILITY

The liability limits of Article 22 WC/GCP have been inserted into the Montreal Convention. In the event of delay, the cumulative limit of the carrier's liability is set at SDR 4,150 for each passenger.¹¹⁴ If the delay only affects baggage, the liability limit of SDR 1,000 applies.¹¹⁵ These liability limits are subject to the Warsaw/Hague Article 25-test, and are therefore not unbreakable.¹¹⁶

B. CARGO LIABILITY

Like Article 25A WC/MP4, the liability limit of SDR 17 per kilogram applies to delay in the carriage of cargo.¹¹⁷ The Warsaw/Hague Article 25-test does not apply to liability for delay in transporting cargo, and therefore this is an unbreakable liability limit.

V. INSURANCE

More than 30 years ago it was suggested that automatic insurance systems might fully replace the Warsaw liability system.¹¹⁸ Even though the Warsaw system as amended has substantially survived in the Montreal Convention, insurance issues have been included in the Montreal Convention.

Under Article 50 MC, carriers must "maintain adequate insurance covering their liability."¹¹⁹ Some legal commentators have indicated their displeasure with the Montreal Convention's attempt to regulate the insurance obligations of carriers within the framework of a convention dealing with liability issues between carriers and passengers or cargo interests.¹²⁰ It has also been argued that "adequate insurance" is a vague term.¹²¹

EC Regulation 2027/97 sets out in greater detail the insurance obligations of Community air carriers, which must be in-

¹¹⁴ See Montreal Convention, *supra* note 3, at art. 22(1).

¹¹⁵ See *id.* at 22(2).

¹¹⁶ See *id.* at art. 22(5).

¹¹⁷ See *id.* at art. 22(3).

¹¹⁸ See LITVINE, *supra* note 30, at 177 § 78.

¹¹⁹ See Montreal Convention, *supra* note 3, at art. 50.

¹²⁰ See Gates, *supra* note 18, at 191; Müller-Rostin, *supra* note 11, at 224.

¹²¹ See Caplan, *supra* note 34, at 200.

sured up to the SDR 100,000 limit. Beyond this limit, however, a similarly unclear "reasonable level" also applies under the Regulation.¹²² The minimum insurance obligation of Community air carriers is connected only to the carriers' liability for risks associated with passenger injury,¹²³ whereas for cargo, delay, baggage and passenger damage above the first tier of 100,000 SDR,¹²⁴ the insurance cover is similarly vague.¹²⁵

VI. FREEDOM OF CONTRACT

Under Article 33 WC and Article 22(1) WC/HP, a carrier can agree on higher liability limits for death, injury or delay. This freedom for carriers to agree to increase or waive liability limits and waive defenses is expressly confirmed in Articles 25 and 27 MC. It has been noted that, regarding the liability schemes for passenger injury issues, the Montreal Convention confirms the validity of IIA and MIA, therefore eliminating the need to incorporate the features of these agreements into Chapter III of the Montreal Convention.¹²⁶ However, this consideration may not take into account that IIA and MIA are essentially contractual instruments, and from a consumer's perspective, cannot offer the same long-term stability guarantees for a liability scheme as can be provided under an international convention.

VII. CONCLUSION

A number of questions need to be clarified by the courts and require further attention, including:

- the relationship between the Montreal Convention and the instruments of the "Warsaw System," in particular EC Regulation 2027/97 (as amended);
- how the "fifth jurisdiction" must be construed practically and in which jurisdiction concurrent proceedings must be

¹²² See Council Regulation 2027/97, art. 3(1)(b), 1997 O.J. (L 285) 1.

¹²³ See *id.*

¹²⁴ A Community carrier is also subject to insurance obligations under Article 7 of EC Regulation 2407/92.

¹²⁵ The proposed amendment to Regulation 2027/97 provides that the insurance obligation of Regulation 2407/92 "shall be understood as requiring that a Community carrier shall be insured up to a level that is adequate to ensure that all natural persons entitled to compensation receive the full amount to which they are entitled in accordance with this [amended Regulation 2027/97]" (Article 3(2) of the proposed amended Regulation 2027/97).

¹²⁶ See Caplan, *supra* note 34, at 198.

brought based on both physical injury and damage to baggage;

- the extent to which mental injury can and should be compensated under the Montreal Convention;
- the assessment of damages on the basis of national law;
- whether social insurance bodies and employers can invoke the strict liability of a carrier within the framework of substituted claims;
- the requirement for timely notice for (partial) loss of checked baggage;
- the amount of advance payments required under Article 28 MC;
- whether the liability for cargo documentation under Article 10 MC is strict, and who is subject to such strict liability;
- the need for delay to be defined and how this might be defined; and
- which insurance cover is required under Article 50 MC.

The authors' overall conclusion is that the Montreal Convention is a successful attempt to unify certain rules pertaining to the contractual relationship between air carriers on the one hand and passenger and consignors or shippers on the other. For the time being we must be careful, as this is an *attempt* to achieve global uniformity. The coming years will reveal whether a sufficient number of states are prepared to ratify the Montreal Convention and truly create a *global* instrument. Further, the practice between carriers, passengers or shippers, and the implementation and elaboration of certain provisions of the Convention in national or regional legislation and case law will demonstrate whether the Convention meets the test of clarity and efficiency so that the objective of uniformity will be achieved.

